

EXHIBIT C

SEALED PORTION REMOVED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA,

Plaintiff,

v.

ROBERT ZANGRILLO,

Defendant.

)
)
)
) Criminal Action
) Nos. 1:19-cr-10080-NMG-19
)
)
)
)

BEFORE THE HONORABLE M. PAGE KELLEY
UNITED STATES MAGISTRATE JUDGE

MOTION HEARING
SEALED PORTION REMOVED

November 26, 2019

John J. Moakley United States Courthouse
Courtroom No. 24
One Courthouse Way
Boston, Massachusetts 02210

Linda Walsh, RPR, CRR
Official Court Reporter
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(Appearances continued on next page.)

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10 Proceedings recorded by sound recording and
11 produced by computer-aided stenography
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P R O C E E D I N G S

THE CLERK: November 26th, 2019, and we are on the record in Criminal Case Number 19-10080, the *United States versus Robert Zangrillo*, the Honorable M. Page Kelley presiding.

Would counsel please identify themselves for the record.

MR. FULLER: Good morning, Your Honor -- or afternoon. Tony Fuller on behalf of U.S.C., and with me is Doug Fuchs and Deborah Wong Yang.

THE COURT: Okay. Good afternoon.

MR. FUCHS: Good afternoon, Your Honor.

MS. YANG: Good afternoon, Your Honor.

MR. WEINBERG: Good afternoon. Martin Weinberg on behalf of Robert Zangrillo.

THE COURT: All right.

MR. VIEN: Good afternoon, Your Honor. I don't mean to be presumptuous because we are not a moving partner but -- party, but George Vien on behalf of Mossimo Giannulli, and with me is Michael Kendall who represents Mr. Wilson and -- I don't want to take over the hearing or get out of order, but really we're here for two reasons. One, we would just like the hearing to be open; and two, and perhaps more importantly, whatever is directed to Mr. Weinberg, we have a simple request that all of the co-defendants get the same information and the

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1 same material. And we'll sign whatever protective order that
2 the Court issues or requires. I just don't want to be in a
3 position of if Mr. Weinberg does obtain documents, that he
4 can't give them to the co-defendant. And as I understand,
5 U.S.C. would give them to the Government, but then we would
6 have to deal with the Government to get them. And we've
7 already filed a *Brady* letter, and I expect litigation on that.
8 So we are trying to cut to the chase and be efficient, and
9 that's why Mr. Kendall and I are here on behalf of the
10 defendants -- our defendants, at least, to make that request.

11 THE COURT: Mr. Fuller?

12 MR. FULLER: I always welcome Mr. Vien's input, as he
13 knows, and I think -- well, two things. One is -- we'll have
14 to talk to the client, but I think it's a reasonable request
15 that they get the same information pursuant to the same
16 confidentiality order that we negotiated with Mr. Zangrillo's
17 counsel.

18 However, that protective order itself I think is the
19 reason why U.S.C. would like to have the hearing, at least a
20 portion, where we discuss the stuff that's been turned over and
21 the e-mails at issue, that we have that in camera because the
22 parties have agreed at least that they're -- the documents and
23 what the information contain are of a sensitive nature, and
24 they are subject to the protective order. So if they were to
25 be used, they would be filed under seal in a pretrial

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1 proceeding. So the parameters of that order itself I think
2 contemplate -- if we're going to be talking about these things
3 in a scenario where a disagreement with one of the parties
4 about what should be turned over, it should be done in camera.
5 So that's our position on that.

6 But in terms of, I think, getting the other defendants
7 the same information, I think that's a reasonable request.
8 We'd have to talk to the client, but on the same terms as were
9 negotiated, I don't think that would be a problem, but I defer
10 to co-counsel if they think it might be.

11 MS. YANG: Yes, Your Honor. Debra Yang. I think
12 that, first of all, I think we want to discuss it with the
13 client and also do at least some sort of visual analysis of it.
14 I think everything, you know, as is requested, has to be
15 tethered under 17(c). I haven't looked at all the different
16 charges for every specific defendant. They are all
17 very -- even though they are the same kind of thing, they are
18 very unique as far as the process at which folks went to and
19 how they ultimately got admitted. So I think we would want to
20 just take a look at that and do some analysis. In good faith I
21 need to do that for the client and have that conversation.

22 But I hear what counsel is saying as far as efficiency
23 and being willing to execute on the protective order; I take
24 that to heart. So if we could report back to the Court or, you
25 know, work that out with counsel, we'll do that.

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1 THE COURT: Sure, okay. So I'm not going to make any
2 ruling now on the general discoverability of the information
3 for other defendants. I assume there will be some overlap
4 about that, but I just think, for purposes of this hearing
5 today, I'll just hear from Mr. Weinberg, and I'll let you,
6 Mr. Vien and Mr. Kendall, work things out as best you can with
7 U.S.C. and perhaps the Government, if the Government is in
8 possession of certain things, and then if you have a problem,
9 to file something. And I think it should be more abbreviated
10 than these proceedings have been because I'll have set some
11 parameters on what U.S.C.'s obligations are.

12 So I do wonder if we do seal part of this hearing if
13 it ought to be -- if the co-counsel ought to be excluded as
14 well. I was thinking the Government would not be excluded.
15 But what's your view on that, Mr. Fuller?

16 MR. FULLER: Your Honor, the Government, I agree,
17 should not be excluded, although I don't believe they're here.
18 Oh, sorry.

19 MR. O'CONNELL: Your Honor, Justin O'Connell on behalf
20 of the Government.

21 THE COURT: The Government is always here.

22 MR. FULLER: The Government is here. They are
23 everywhere. But, yeah, we agree that the Government should be
24 here. Obviously certain materials -- I'm sorry. I should
25 stand.

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1 THE COURT: It's all right.

2 MR. FULLER: -- that were submitted ex parte, the
3 Government hasn't, I believe, had seen those. But to the
4 extent that we're going to be talking about what's been
5 produced and what's at issue in our papers, they are welcome
6 to -- we agree they should be there.

7 THE COURT: Okay. And what about other counsel in the
8 case?

9 Mr. Fuchs?

10 MR. FUCHS: Just a moment, Your Honor. I can speak or
11 I can -- I would say that they're not yet parties to the
12 protective order that we signed, and therefore, we would not be
13 comfortable at this point having them present for any
14 discussion --

15 THE COURT: Sure, okay.

16 MR. FUCHS: -- of confidential information.

17 THE COURT: Yes, Mr. Vien?

18 MR. VIEN: Your Honor, Mr. Kendall and I will sign the
19 protective order right now, and we think we should be privy to
20 these discussions in part because our entire analysis is --
21 there's one conspiracy charge, so if it's relevant to a member
22 of the conspiracy, it's relevant to all the members of the
23 conspiracy.

24 THE COURT: Sure. I mean, I'm not quite sure that
25 we're going to need to do the ex parte or the sealed hearing.

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1 I don't know, Mr. Fuller, what you've prepared as far as your
2 argument goes. Why don't we just go ahead and get started with
3 argument, and I'll try not to speak specifically about the
4 materials and give away -- at this point, I've read so much,
5 I'm not -- I don't trust myself not to say things that were in
6 an ex parte filing, but I'll try to ask general questions. And
7 let's see how far we can get, and then if we need to exclude
8 the public, we'll do that. And -- yes?

9 MR. WEINBERG: Thank you, Your Honor.

10 MR. FUCHS: Your Honor, sorry. I just want to say
11 that I was going to be taking the lead on the argument
12 responding to defendant Zangrillo's remaining outstanding
13 issues and everything about those issues involves what has
14 already been produced to defendant Zangrillo and which is
15 subject to the protective order. So it's almost impossible to
16 make any argument to discuss his outstanding requests without
17 referring back to the information that --

18 THE COURT: That you provided.

19 MR. FUCHS: -- the comprehensive information that we
20 produced subject to the protective order.

21 MR. WEINBERG: I simply don't agree. We had a public
22 hearing on the original motion to quash by U.S.C. that related
23 to filings we made that are highly relevant to the
24 decision-making today. There are general disagreements between
25 U.S.C. and myself regarding, you know, the 17(c), the Nixon

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1 test, whether we should superimpose some civil test and allow,
2 you know, U.S.C. to argue things accumulative, or prejudice
3 outweighs relevance, or concepts that are far into the Nixon
4 tests. We can certainly address the generic issues.

5 I also wanted to just say one more thing since the
6 Government is here, which is that pursuant to the
7 confidentiality agreement, which I signed with U.S.C. in order
8 to expedite the production and minimize the litigation, I have
9 given to the Government as part of reciprocal discovery every
10 page, 242 pages to be precise, at least about 242, that I
11 received from U.S.C. So the Government has it. You know, they
12 need to evaluate whether or not that triggers their *Brady* or
13 Rule 16 obligations. I certainly have a strong opinion whether
14 it does or not, but it's a second waif to try to cut through
15 the understandable issues that have been raised by Mr. Vien,
16 Mr. Kendall, and others who have offered to sign the protective
17 order with U.S.C., as well as the ordinary protective order.

18 I've communicated their willingness to sign the U.S.C.
19 confidentiality agreement in which case I could have provided
20 the documents directly to them but didn't because of the
21 conditions that I received them. So I think U.S.C. can decide
22 whether to reconsider its communication to me telling me no,
23 you know, you can't give those documents even when people sign
24 the protective order; or two, the Government being here should
25 seriously think about whether or not in the next Rule 16

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1 discovery to produce those documents to co-counsel.

2 THE COURT: Well, okay. So how about if you argue,
3 Mr. Weinberg, and Mr. Fuchs, if you find the argument is
4 encroaching on what you consider to be protected information,
5 I'll just count on you to object. Yes?

6 MR. FUCHS: That's fine, Your Honor. I think that
7 when we have the opportunity to present our side in rebuttal,
8 if you are going to allow Mr. Weinberg to speak first, that we
9 would request that that be in camera because I know we're going
10 to want to refer to the protected material --

11 THE COURT: Okay.

12 MR. FUCHS: -- that we produced. If Your Honor
13 then -- I just think it would be -- enable a more seamless
14 presentation of the issues, a discussion of all of the issues,
15 and then if Your Honor wants to come back out and issue
16 findings on the record that don't touch on the protected
17 material, that's of course your prerogative.

18 THE COURT: Okay. All right. So I think I will let
19 Mr. Weinberg go ahead with the caution that we're taking a
20 narrow view of what's protected here, so.

21 MR. WEINBERG: Thank you, Your Honor.

22 First, the context. I think, you know, we have worked
23 with U.S.C. to try to avoid restarting the subpoena process
24 following the last hearing and issuing an amended subpoena if
25 it would, you know, build on our new and evolving knowledge of

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1 how the U.S.C. program and practices work. We've worked
2 together to narrow the disputes. We've -- I've narrowed a
3 four-year subpoena to one year. There's no need to search 22
4 different, you know, e-mail boxes for the deans of each of the
5 schools at U.S.C. We've narrowed it down to Mr. Brunold and
6 Mr. Brennan, and we've signed the confidentiality agreement.

7 What's left is the three areas of dispute. One being
8 the advocacy e-mails; two being U.S.C.'s desire to either
9 continue to broadly redact the documents that they've produced
10 to me or to superimpose the designations of the people whose
11 names they want to redact. In other words, instead of having
12 an authentic document that says X donated money. Please let
13 his student in, they want to eliminate X and say alumni or
14 parent or dean is advocating for parent, et cetera. I'll
15 address that second.

16 The second part of the context is what U.S.C. produced
17 to the Government. You know, they are represented by some of
18 the biggest and best law firms in the United States. It's
19 simply implausible to me that with the argument they made they
20 didn't realize the Government would be producing to defense
21 counsel of indicted defendants what U.S.C. produced to the
22 Government, but they produced to the Government 250,000 pages.
23 It did not redact donors' names. It did not redact sponsors'
24 names. It did not redact anything. It didn't redact students'
25 names. And it provided the bases for the opposition that I

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1 provided the Court that led to our original hearing.

2 They are taking a dramatically different position
3 regarding the 17(c) subpoena, and they're taking it, with all
4 due respect, you know, with what I think is an insensitivity to
5 the needs of a criminal defendant. They don't get to decide,
6 you know, when I have enough evidence if the evidence matches
7 the Nixon test. They don't get to argue, well, this might
8 embarrass, you know, a sponsor or donor. They do get to raise
9 privileges, but they don't get to withhold documents because
10 they can argue I've got a list so I don't need an advocacy
11 e-mail, or they get to redact business records because they
12 don't want to have a name of a sponsor or a promoter or an
13 alumni or whoever is pushing for a particular student to be
14 part of the production when in the context I have precisely
15 that kind of evidence from the Government through Rule 16 but
16 narrowed to the athletic department.

17 And so I've made the argument that I need, for a whole
18 host of reasons, to detoxify the likely Government argument
19 that athletics and Donna Heinel and the athletic subco and all
20 of the athletic programs are different than the rest of the
21 university. And the university shouldn't be defined by its
22 athletic department.

23 What I've tried to do in the original opposition
24 is -- and what I've received in exhibits, which we can discuss
25 in camera, is evidence that I think helps that detoxification.

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1 It broadens the practices of the university, and that's
2 essential to my defenses. So when you drill down to why these
3 documents that are in dispute are needed, first, they match the
4 Nixon test. They're all admissible. The unredacted list is
5 more admissible than a redacted list because it's an authentic
6 business record rather than a record that U.S.C. unilaterally
7 changed.

8 Second, it's specific. We've negotiated specificity.
9 We've narrowed it to Brunold and Brennan. We've narrowed it to
10 the year surrounding Amber Zangrillo's admission.

11 So the only third issue is relevance and materiality.
12 The principal overriding reason why the documents are necessary
13 is that Amber Zangrillo was advocated for by athletics as a
14 VIP, not as an athlete. In other words, it may be
15 counterintuitive, but athletics, as we now know, advocates for
16 many students through the VIP process knowing that these are
17 not athletes. Amber Zangrillo is particularly, you know,
18 emblematic of that because she suffered medical issues, that
19 she provided essays, character references. Her entire
20 application was saturated with information that would
21 demonstrate to any admissions department this is not a world
22 class athlete.

23 So I want to show with the advocacy e-mails that are
24 being withheld, with the unredacted lists, that the other 22
25 departments advocate for their special interest students, not

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1 necessarily say the history department because this is the
2 smartest high school historian or the film department because
3 this is the most talented future film director, but because
4 these are lucky students that have family or friends or
5 neighbors or sponsors or advocates that either have donated or
6 are perceived as likely to donate to U.S.C. This is not unique
7 to U.S.C. This is a --

8 THE COURT: So don't the spreadsheets that you've been
9 given, even if they were further unredacted -- I know they're
10 heavily redacted -- demonstrate that?

11 MR. WEINBERG: Yes, they demonstrate that. And if
12 they're unredacted, they would demonstrate that better and
13 they'd be admissible, and I wouldn't have to trust U.S.C. what
14 to redact and what not to redact and what to give and what not
15 to give. I don't think there's a privilege to anything that
16 they're redacting. Putting that aside, yes, the list --

17 THE COURT: I agree with what you say so far, as far
18 as the law concerning the restrictions on the information that
19 you should be receiving, but, you know, Nixon is very clear
20 that I have discretion to limit requests that are unreasonable
21 or oppressive, and I haven't found too much explication of that
22 in the case law. But one way that your request might be deemed
23 unreasonable or oppressive is if you already have enough
24 information to make your point, and I hear you that you never
25 have enough evidence in your client's support, but if you can

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1 make the point ably at trial that it could be unreasonable or
2 oppressive to kind of expose the inner workings of the
3 university when they find that to be either proprietary
4 information -- we know college admissions is a very hot topic
5 these days, and I don't know that U.S.C. should be made to lay
6 bare all of its admissions secrets when your client already can
7 cover his bases.

8 MR. WEINBERG: I have strained to accommodate those
9 legitimate interests on U.S.C.'s behalf. If Your Honor looks
10 at the lists, 30 columns are completely redacted. We're
11 fighting about Column 31 and the "Notes and Comments" section.
12 So all of the --

13 THE COURT: Well, I do want them to unredact some of
14 those columns for you even if they replace it with like a
15 generic description. But with regard --

16 MR. FUCHS: Your Honor, I'm sorry to interrupt --

17 THE COURT: Yes?

18 MR. FUCHS: -- but I did want to just pick up on
19 something Mr. Weinberg said. We redacted information in the
20 spreadsheet that we're talking about either because it was
21 necessary to protect student privacy under FERPA, which
22 Mr. Weinberg agreed with, or alternatively, it reflected
23 proprietary information. He's not arguing about that here
24 today. The only thing that's at issue are the redactions of
25 individual names in the "Comment" section of that chart. So

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1 the chart itself as redacted is fine per agreement of the
2 parties. The only thing at issue are the names in that last
3 column.

4 THE COURT: Okay. So in his brief he pointed out his
5 Exhibit 11, which -- do they have your Exhibit 11?

6 MR. WEINBERG: Yes. These are -- they certainly do
7 have everything, Your Honor.

8 THE COURT: Okay. So in Exhibit 11, for example, the
9 column titles are redacted, and I understand that you may be
10 referring to proprietary information because those are
11 admission criteria.

12 MR. FUCHS: Yes, Your Honor, different than I think
13 what's in 11, although I need a moment to look at 11.

14 THE COURT: Sure, but I just wonder -- so in Exhibit
15 11, the titles of columns are -- a lot of them are redacted and
16 the referral source is redacted, which I think could be, at the
17 very least, generically described. But -- so I want you to
18 continue with your presentation, Mr. Weinberg, but I'm
19 interested in the question that U.S.C. raises which is why are
20 documents showing influential people lobbied Mr. Brunold, the
21 director of admission, for admission of particular people
22 relevant when no one did that for Ms. Zangrillo?

23 MR. WEINBERG: And the answer is three or four reasons
24 why it is relevant.

25 THE COURT: So one could be your client's state of

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1 mind, right?

2 MR. WEINBERG: Correct.

3 THE COURT: And his understanding of how the process
4 worked?

5 MR. WEINBERG: Yes. He's in part a Los Angeles
6 businessman, although he spends time in Miami, and it is -- I
7 will be able to prove that it is widespread knowledge that
8 having a powerful person who's part of the, quote, Trojan
9 family advocate for you radically increases your chances for
10 admission.

11 THE COURT: Well, sure. And that actually seems -- I
12 think everyone probably assumes that to be true. So I just
13 wonder, directing my question to U.S.C., is there some way to
14 admit this and then you don't have to turn over all these
15 documents, but you're -- Mr. Weinberg just knows at trial
16 you're going to answer that question yes?

17 MR. FUCHS: To make the general point, Your Honor,
18 acknowledge the general point -- let me talk about the
19 compromise we have offered, which I think actually gets to the
20 issue that Mr. Weinberg is trying to prove much more cleanly
21 and crisply, and that is, rather than have names of people who
22 are meaningless to a Boston jury, an unknown to Mr. Weinberg,
23 we have offered to put in labels which define these people's
24 role or title in society which immediately demonstrate that
25 they are or are not people of influence.

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1 THE COURT: And people of -- and that would be
2 attested to -- I mean, one of the problems he raises is how
3 will I know that that's accurate, but you could have someone
4 attest that they have so designated these people and that
5 that's an accurate designation.

6 MR. FUCHS: Yeah, in fact -- exactly, Your Honor, that
7 we have -- unfortunately we were unable to complete the
8 exercise prior to this hearing because it is -- it takes a
9 tremendous amount of work to check all the names in the
10 spreadsheet and in good faith to try to demonstrate who all
11 these people are. But we would have someone who could do that,
12 if necessary, that they were -- they gathered information from
13 a variety of sources similar to the declarations that we
14 voluntarily put together and provided to Mr. Weinberg relating
15 to other information that we provided that I think Your Honor
16 is aware of that I'd prefer not to get into right now.

17 THE COURT: Sure. So let me just let Mr. Weinberg
18 continue. Okay.

19 MR. WEINBERG: In terms of why I would want more of
20 dividing up the advocacy e-mail, which I'll address secondly,
21 20 or so e-mails that have been provided ex parte from the
22 redaction issue: One, it remains an inauthentic document.
23 It's a business record of U.S.C. that U.S.C. is unilaterally
24 changing. I have no assurance from the Government that they
25 would not object and say what is this, it's not a business

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1 record.

2 THE COURT: Well, obviously if the Government refused
3 to admit such a document because it was redacted, it would have
4 to be unredacted, so.

5 MR. WEINBERG: I have a second issue which is a jury
6 looking at what would obviously be something other than a
7 business record. We have a "Notes and Comments" section or,
8 you know, "Referral" section or "Source," dean or trustee,
9 rather than a human being. It would require an explanation to
10 the jury that U.S.C. made this objection and, you know, was
11 allowed to substitute, you know, labels for people.

12 THE COURT: Sure. I think these are the kind of
13 arguments that perhaps would be made to the trial judge about
14 the efficacy of using certain things and whether -- I mean, I
15 think that's something you could raise just for purposes of
16 discovering it and letting you prepare your defense.

17 MR. WEINBERG: Third, if I could --

18 THE COURT: Yes?

19 MR. WEINBERG: -- you know, intervene before Your
20 Honor makes a preliminary decision?

21 THE COURT: Sure, sure.

22 MR. WEINBERG: I think I have a right to interview
23 some of the people. Obviously I'm not going to interview 100
24 people. Obviously I'm not going to try to call 100 people as
25 witnesses, but if I could find witnesses whose experience

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1 matches Mr. Zangrillo's experience, I at least could, you know,
2 attempt to produce that witness and have them testify. Jurors
3 need --

4 THE COURT: So why is that admissible?

5 MR. WEINBERG: It would be admissible, A, to show the
6 general knowledge of how the admissions process works from the
7 perspective of sponsors and donors as well as parents. And,
8 you know, I would -- I'm going to try to legitimize -- despite
9 this kind of public passion that's played out in the media,
10 I've got a burden to legitimize donations, to demonstrate to
11 the jury they're not criminal.

12 THE COURT: Sure. I don't think you have much of an
13 uphill battle convincing a jury that if you give donations to a
14 school, you would improve your chances of getting in. I mean,
15 I don't for a second believe Mr. Brunold's affidavit that he
16 submitted here, and I think it's belied by many of the
17 documents that we've received. I mean, part of the problem
18 we're facing here is that I think you have a very basic fact
19 that you need to get across to a jury to support your defense
20 that I think jurors would have no problem accepting as true,
21 and U.S.C. has gone on the record saying that's not true. So
22 you're digging assiduously for documents showing that donations
23 affected a person's chance of getting in, and U.S.C. is denying
24 that's true. And I think it's caused U.S.C. a lot of trouble
25 here unnecessarily. Even if the parting line there, which I

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1 know may be we don't admit people because they make donations,
2 I just think that's not credible.

3 MR. WEINBERG: But it's not credible given reality,
4 but to jurors who will come to the jury and believe that their
5 kids' chances to get in have, you know, have been minimized,
6 inequitably minimized or trivialized by a system, I've got an
7 uphill battle.

8 Mr. Zangrillo is presumed innocent, but from what I've
9 seen in the public media and in responses of the public media,
10 there is a passion against the wealthy or the influential
11 having any advantage, you know, in the system. People may
12 recognize it but, you know, the line between what Mr. Rosen and
13 Mr. O'Connell, their team, will be arguing are appealing to
14 this sense that it is illegal not to have a meritocracy. I've
15 got to prove that it is not only not illegal but that U.S.C. is
16 not a victim, and they made a victim impact statement and the
17 Government claims they're a victim. They are not a victim.
18 They welcome people like Mr. Zangrillo. They reward people who
19 are like Mr. Zangrillo who gave donations in the past, and they
20 welcome the students of the people that advancement targets for
21 potential donations in the future.

22 And this is the antithesis of being a victim of fraud
23 to claim that they've been denied money or property or that
24 their admissions slot is some wire fraud when so many people
25 similarly situated to Mr. Zangrillo, donors, people that know

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1 donors, people that know past donors, people who might donate
2 in the future, are admitted. But I've got to fully embrace a
3 practical burden despite the principles that the burden rests
4 exclusively on the Government. I'm fighting a tidal wave of
5 negative and toxic publicity that doesn't make distinctions,
6 you know, other than anything that doesn't demonstrate
7 meritocracy is wrong, and jurors tend to have a shorter route
8 from feeling morally wrong to feeling like a crime than they
9 would if they felt the donation process was moral. And so I'm
10 seeking, therefore, different categories of information. I've
11 received the statistics through the declarations.

12 MR. FUCHS: Your Honor, this is exactly what I wanted
13 to avoid having.

14 MR. WEINBERG: I'm not naming the statistics.

15 THE COURT: Okay. All right. So thank you for
16 objecting. All right. So why don't we -- you just address --
17 well, how much more do you have to say?

18 MR. WEINBERG: Just one other area --

19 THE COURT: Okay.

20 MR. WEINBERG: -- which is that the relevance, and I
21 will not get into the specific documents, but why do I need the
22 advocacy e-mails? Because I want to show that those e-mails
23 that the Government gave me, that they received from U.S.C.
24 that were Donna Heinel's e-mails to Tim Brunold, which are in
25 the -- which were not within our confidentiality agreement, are

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1 not aberrational, that athletics was not an aberration, that
2 just like athletics urged -- not just by having lists but urged
3 through advocacy. Whether it's on the phone I can't prove
4 without testimony, but if they did it by e-mail saying pick a
5 student from the list and urge his admission, I want to show
6 that was done by the Marshall School of Business, I want to
7 show that was done by the Annenberg School of Communications, I
8 want to show the development was involved.

9 THE COURT: So you have the spreadsheets from those?

10 MR. WEINBERG: I have the spreadsheet that shows --

11 THE COURT: Advocacy.

12 MR. WEINBERG: I have a spreadsheet that has the
13 "Notes and Comments" section that's heavily redacted, but I
14 have e-mails from Ms. Heinel to Mr. Brunold that I want to
15 match by showing that in the U.S.C. practice more was done than
16 just simply tagging students through lists.

17 THE COURT: Okay.

18 MR. WEINBERG: That individuals on that list got
19 special advocacy on one-to-one e-mails from people of power to
20 admissions and that Mr. Brunold's, you know, expected testimony
21 that he didn't want that and didn't consider that was
22 contradicted by the frequency that people sent him lists that
23 mentioned donations or sent him advocacy e-mails that explained
24 why a certain student, not because they were the best high
25 school theater person but because they were the daughter of a

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1 wealthy donor or the daughter of a friend of a wealthy donor.
2 I need those individual e-mails because that's something the
3 jury can relate to. That's something that matches what Heinel
4 did from the athletic special VIPs, and it's within Nixon.
5 They're relevant to my defenses. They're relevant to the
6 defense that Donna Heinel was doing what the university
7 approved.

8 She didn't breach her honor services by reaching out
9 to Tim Brunold to support certain students. She was doing
10 exactly what Pat Haden asked her to do and what the university
11 welcomed that she did.

12 THE COURT: And right now the e-mails you're talking
13 about are the 20 e-mails that you were not given?

14 MR. WEINBERG: Yes.

15 THE COURT: Okay.

16 MR. WEINBERG: I haven't seen them. I can only
17 predict that they are para -- that if U.S.C. is fighting so
18 hard to withhold them that they in some respects further prove
19 by overriding case that U.S.C. is not a victim and Donna Heinel
20 did not violate 1346, at least in the way that she advocated
21 for Amber Zangrillo. Mr. Zangrillo's state of mind was
22 accurate and circumstantially supported by the business records
23 of U.S.C., and in essence, athletics could advocate for
24 nonathletes, just like the history department, to name one of
25 22, who predictively have advocated for people not just because

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1 of his skills as a future historian. Thank you.

2 THE COURT: Okay. Okay. So I think I will seal the
3 hearing, and I think the Government may stay but I'm not going
4 to have other defendants stay at this time. And this is all
5 being recorded, Mr. Vein. I know this displeases you, but
6 you'll be able -- you are not participating anyway. There will
7 be a record of the hearing. So -- and I think -- I'm happy to
8 entertain motions for transcripts of it in the future after the
9 parties have sorted out the protective order issue.

10 MR. VEIN: Your Honor, I understand your ruling. I'm
11 not going to belabor it and take your time. I object to it,
12 but I want to move on.

13 Regarding the issue that brought us here, whether
14 U.S.C. will agree to give us, the rest of the defendants or at
15 least Mr. Wilson's attorney and me, whatever they give to
16 Mr. Weinberg, I was wondering if you could -- it seems like
17 it's a yes or no answer. Could they tell us by Monday?

18 THE COURT: Yeah, I'm not going to rule on that now.
19 U.S.C. hasn't had a chance to -- I don't know. Did you talk to
20 them about this before today? I'm not going to be hearing
21 argument on this, Mr. Vien. That's not the purpose of this
22 hearing.

23 MR. VIEN: I know. I just wanted an answer so I don't
24 waste anybody's time.

25 THE COURT: I know you do, but you're not going to get

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1 one from me right now. So -- okay. So we'll just ask everyone
2 to step out, and I'll hear you argue, Mr. Fuchs.

3 MR. KENDALL: Just so I can make my record, Your
4 Honor, I just want to note my objection that the Government is
5 going to hear things that I'm not going to hear, and that's
6 really my point. We're all one conspiracy. It's all one
7 prosecution team.

8 THE COURT: So because we're talking -- the reason I'm
9 doing this, Mr. Kendall, is because you've had months to join
10 in this effort. You show up at the hearing today unannounced,
11 take a seat at counsel table, stand up and address the Court as
12 if you're part of the hearing, which you are not. And I think
13 I'm being very polite to you actually, and you can file
14 something. This is being recorded. You're not being shut out
15 permanently. You can certainly get a transcript of it once
16 you're entitled by joining a protective order or whatever it is
17 you wish to do to hear the information that is presently
18 protected. So I don't doubt that you are going to have a right
19 to this, but I'm just not going to rule on it right now.

20 MR. KENDALL: Okay. Thank you, Your Honor.

21 THE COURT: Okay.

22 (All parties exit the courtroom.)

23 * * * * *

24 (Recording and transcript is sealed from 12:44:49 to 1:46:13)

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* * * * *

(On the public record. Recording begins at 1:54:26)

THE CLERK: Today is Tuesday, November 26th, 2019, and we are back on the record in Criminal Case Number 19-10080, the *United States versus Robert Zangrillo*, the Honorable M. Page Kelley presiding.

THE COURT: Okay. And can we just have counsel identify themselves again.

MR. FULLER: Good afternoon, Your Honor. Tony Fuller along with Doug Fuchs and Deborah Wang for U.S.C.

MR. WEINBERG: Martin Weinberg for Zangrillo.

THE COURT: Okay. So we have had a very lengthy ex parte -- well, not ex parte, but under seal argument concerning the issues that are still remaining with regard to the 17(c) subpoena. The Government, I will note for the record, was present.

We are now back on the public record, and in the interest of moving things along, I'm not going to enter a written order. I'm going to rule from the bench here. So I'm guided by *United States versus Nixon*, which I find to be the leading case concerning 17(c) subpoenas. And most relevant here to my analysis is that in *Nixon* the Supreme Court said that a 17(c) subpoena can be modified by the Court if compliance would be unreasonable or oppressive, and I am -- I agree with Mr. Weinberg in his filings concerning the

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1 good-faith basis that he has for seeking certain information
2 from U.S.C., but I am balancing that against the trouble that
3 U.S.C. has to go to to produce the information. And also, I do
4 credit U.S.C.'s representations concerning that it's
5 proprietary information about its admissions process and also
6 concerning the -- just the importance of keeping information
7 concerning donors and other friends of the university's actions
8 private.

9 So I also find that no one has suggested that any
10 information about individual students should be produced by
11 U.S.C. These are prospective students, many of them are high
12 school students, some of them are minor, they have rights under
13 FERPA, and also, I find that they have a privacy interest. The
14 information about them is extremely sensitive. It involves
15 their test scores, their academic achievement, other people's
16 assessment of their abilities, et cetera, and so that is just,
17 I think, off the table, and I don't think anyone is seeking
18 that information but I would not allow it.

19 So with regard to the specific disputes here, I will
20 allow U.S.C. to produce the tables that were discussed with the
21 names of people redacted and the replacement of those names
22 with the person's role or a description of the person's
23 occupation as in the sample table that was handed up to me
24 during the hearing. But I do want to caution U.S.C. that I'm
25 allowing its request for redactions, but I don't want to

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1 disadvantage defendant in preparing for trial or especially, if
2 there is a trial, at the trial. And so, for example -- an
3 example might be if the defendant wanted to establish that
4 deans involved in the communications at issue were from
5 different schools or departments across the university and a
6 witness said, oh, I can't tell because it's been redacted, then
7 that would be a problem and that should not happen. Or if a
8 defendant cannot link -- if defendant cannot link different
9 e-mails to the same person because of the redactions, that's
10 going to be a problem. So in other words, I want U.S.C. to
11 work with defendant to clarify matters and assist him in
12 working around the redactions if he has questions or if the
13 redactions make things unclear.

14 And if, as Mr. Weinberg has suggested, the Government
15 takes the position that redacted documents are not admissible
16 as business records or otherwise not usable at trial and they
17 otherwise would be admissible, then the documents may have to
18 be unredacted. And my intention is not to render documents
19 inadmissible, and I think that would be patently unfair.

20 Mr. Weinberg also complains that he has no means of
21 checking the accuracy of the redaction of names and replacement
22 of those names with the description of the person's role, and
23 so, to ameliorate this, the redactions need to be accompanied
24 by an attestation, some kind of sworn statement from the person
25 who did the redactions.

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1 So with regard to the 20 items that U.S.C. attached to
2 its filing and requested it not have to give to the defendant,
3 I do find that those are relevant but only the e-mails to
4 Mr. Brunold or where he's copied on them, and I will permit
5 U.S.C. to redact the names of the persons involved and replace
6 them with descriptions as you do in the table that was handed
7 up. And I'm going to -- I want to make sure that these
8 materials are protected and they're not used without seeking
9 permission from the Judge.

10 So with regard to the additional donor information,
11 I'm going to find that it's in a balancing consideration, it's
12 troublesome for the school and not that relevant, and I'm also
13 not going to force U.S.C. to run additional search terms
14 through its system at this time. Okay.

15 Any questions?

16 MR. FUCHS: One question, Your Honor, with regard to
17 the 20 e-mails, there's also proprietary information reflected
18 in those. Are we able to redact that information?

19 THE COURT: So the proprietary information I think
20 you're referring to has to do with the admissions process
21 itself?

22 MR. FUCHS: Yes.

23 THE COURT: And I couldn't really understand what it
24 was while I was looking at it, and I wonder if you could file
25 something ex parte explaining what that is.

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1 MR. FUCHS: Yes.

2 THE COURT: I noticed there were terms being used, but
3 I don't know what their significance is. And I think I'll take
4 a look at that and rule further on that.

5 MR. FUCHS: Thank you, Your Honor.

6 MR. WEINBERG: Just the last thing, I'm sure U.S.C.
7 tends to preserve the original documents just in case we need
8 them at trial, and I would ask the Court to -- I would ask
9 U.S.C. to agree that any document that they provided redacted
10 form pursuant to Your Honor's orders, they would preserve the
11 unredacted documents so if needed it's available.

12 THE COURT: Okay. Any problem with that?

13 MR. FUCHS: No, Your Honor. I would just, though,
14 pick up on one thing you mentioned about seeking leave of Court
15 before these documents were to be used, these 20 e-mails, I
16 think you mentioned seeking leave of the District Court, we've
17 entered into a protective order with Mr. Weinberg, and I'm
18 wondering, Your Honor, if you would order that the protections
19 in that protective order govern the documents that were
20 produced to Mr. Weinberg so as to not limit them somehow --
21 limit the protection to the agreement between us and
22 Mr. Weinberg but actually protect the documents themselves.

23 MR. WEINBERG: I don't know what Mr. Fuchs is relating
24 to. We have two different means of protected documents in the
25 case, one is the protective order which is between all the

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1 defendants and the U.S. Attorney's Office that prevents
2 dissemination and set for litigation purposes. We have a
3 second confidentiality agreement between U.S.C. and myself that
4 prohibits me from using or in any way filing any of the
5 documents that I received from U.S.C. litigation, and I
6 consider that to include both anything I received as a result
7 of today's decisions as well as what I received several weeks
8 ago. That protects U.S.C. against pretrial use except under
9 seal, absent the Court not wanting it under seal and I have to
10 give U.S.C. notice. At trial there's an exhibit list, and to
11 the extent I would want to use any of the 20 exhibits, I would
12 be identifying them by date of e-mail but not by content on the
13 exhibit list. The Government could object, and I'm glad to be
14 required to give U.S.C. notice as to the 20 e-mails about --

15 THE COURT: Sure, I think the use of trial is one
16 thing, but I guess what is new here is that the documents are
17 being given to you, you're giving them to the Government, and
18 then they're governed by this much less strict rule.

19 MR. FUCHS: Exactly, Your Honor. And in order to
20 facilitate the distribution of the documents, which apparently
21 at least two of the defense counsel want, having a protection
22 over the documents that is no different than what Mr. Weinberg
23 has agreed to is what we're requesting.

24 THE COURT: So, in other words, you -- I mean, I'm --

25 MR. FUCHS: There can't be an end run around the

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1 protective order. In other words, they go to the Government
2 and then the Government is under some other obligation to do
3 something with those documents, and now they're no longer
4 protected. We want the protections to run with the documents,
5 the same protections he's already agreed to.

6 THE COURT: So I think it's hard if the documents run
7 to the Government and the Government isn't part of the
8 protective order for them to just magically be governed by a
9 protective order that they haven't acknowledged.

10 So I don't know -- here's what I would like you to do:
11 With -- let me just ask the Government since they're here.
12 Have you already distributed any of the materials that you got?

13 MR. O'CONNELL: No, I don't think at this point. I
14 think we only got the materials from Mr. Weinberg --

15 THE COURT: Last week.

16 MR. O'CONNELL: -- in the last week or so, and they
17 haven't gone out.

18 THE COURT: Let me do this: Let's have U.S.C. talk to
19 the Government about what you're going to do with documents
20 that you're given -- that defendants share with you because
21 they also have reciprocal discovery obligations that may
22 obligate them to give over certain of the documents they get
23 from you. So let's have the Government either enter into
24 protective orders with defendants or U.S.C. or someone. Let's
25 make sure those documents are still protected if U.S.C. wants

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1 them to be, okay?

2 MR. O'CONNELL: Your Honor, I think from the
3 Government's perspective, we concur with U.S.C.'s position and
4 Mr. Weinberg's position. I think, if we've learned anything
5 from the last time in trying to negotiate a protective order,
6 the defense counsel sometimes does not, so I think it kind of
7 puts us in a little bit of a bind. We do have those discovery
8 obligations. We do have to produce that, but we can raise
9 those when they come up. I heard Mr. Vien and Mr. Kendall say
10 today that they would enter an order. I saw Mr. Kelly in the
11 back of the room. I don't know what his position is. But
12 we're open to those conversations.

13 THE COURT: Well, I think this all gets complicated by
14 the fact that these documents may have absolutely no relevance
15 to some defendants who weren't involved at U.S.C., and also,
16 we've got -- this is such a big case that we've got a lot of
17 people potentially, even with that limitation, who might want
18 these documents. So I'm going to just leave it up to the
19 parties to work together and figure out a way to protect these,
20 and I'm happy to sign off on anything you agree to. And if you
21 can't agree, then we'll have a hearing on it.

22 MR. O'CONNELL: Just for context purposes, Your Honor,
23 not to belabor the point, but most of the remaining defendants
24 do have a U.S.C. connection. Some are purely testing, but most
25 of them are U.S.C. So to the extent that these documents have

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1 any relevance, which I know Marty and I have a respectful
2 disagreement on, for anybody, I think that they would be
3 pertinent if you assume the relevance of those documents.

4 MR. FUCHS: And we will try to work with Mr. Weinberg.
5 He's offered to before to help in this regard, and we'll work
6 with the Government as well to try to get everyone who has a
7 U.S.C. connection or who otherwise might get these documents to
8 sign off on the same protective order that Mr. Weinberg signed
9 off on.

10 THE COURT: Okay. And if you're encountering problems
11 with that, let's not let time go by because I think time -- the
12 time is getting narrower here in this case, and we'll -- I'm
13 happy to hear you by phone. You don't have to come all the way
14 from California or local counsel or whatever, and we'll try to
15 work through those issues, okay.

16 MR. FUCHS: Thank you, Your Honor.

17 MR. WEINBERG: Thank you, Your Honor.

18 MS. WANG: Your Honor, thank you for hearing us during
19 the week of Thanksgiving, too.

20 THE COURT: No problem.

21 (Recording ends at 2:09:11)
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